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C.A. 90-16831

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1992

JEAN BELANGER, Petitioner

vs.

MADERA UNIFIED SCHOOL DISTRICT;
THOMAS J. RILEY, Superintendent of
MADERA UNIFIED SCHOOL DISTRICT, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEAN BELANGER, Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether local school districts in California enjoy absolute immunity from suit under the Eleventh Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner JEAN BELANGER respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit entered in the above-entitled action on April 29, 1992.

DECISIONS BELOW

On November 2, 1990, the U.S. District Court for the Eastern District of California entered judgment for respondent MADERA UNIFIED SCHOOL DISTRICT on the grounds that it was a state agency absolutely immune from suit under the Eleventh Amendment to the United States Constitution. The District Court's jurisdiction was invoked under 29 U.S.C.Section 1343.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on April 29, 1992, on the grounds that local school districts in California are mere agents of the state and enjoy absolute

immunity from suit under the Eleventh Amendment. The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. Section 1291. (Appendix A)

On May 12, 1992, petitioner filed a Petition for Rehearing en Banc. An active judge requested a vote on whether to rehear the matter en banc but the matter failed to receive a majority of votes. The petition was denied on October 1, 1992. (See Appendix B)

PARTIES

The parties are solely those listed in the caption.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(l).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution.

2. 42 U.S.C. Section 1983.

3. Articles l, Section 7 and Article IX, Section 14 of the California Constitution.

4. California Education Code Sections 35160, 35160.1, 35162, and 35201

5. California Government Code Sections 970(c) and 9709.4

6. Article VI, Sections 2 and 3 of the Ohio Constitution

7. Ohio Rev. Code Ann. Sec. 3301.07

STATEMENT OF THE CASE

Petitioner JEAN BELANGER filed suit against her employer, respondent MADERA UNIFIED SCHOOL

DISTRICT, for violating her First and Fourteenth Amendment rights when it demoted her in retaliation for her federal court testimony against the school district in the successful gender discrimination trial of a female colleague.

Respondent MADERA UNIFIED SCHOOL DISTRICT asserted that it was absolutely immune from suit under the Eleventh Amendment because it was a mere agent of the state. The District Court ordered the parties to engage in extensive discovery to ascertain the financial relationship between local school districts and the State of California. That discovery elicited the following information.

Local school districts are anomalies which resist precise definition or classification. Their status in California has evolved by accident of history, tax reform, and legislative action.

Although education is a matter of state concern, local school districts are independent entities which govern themselves, sue and are sued in their own names, and hold

and convey property. Education Code Sections 35162 and 35160.

Historically, all school districts in California derived their revenue from local property taxes and received little state funding. Passage of Proposition 13, however, restricted property tax funding and created a school financing system which allows wide variations between districts in their funding sources. Many districts rely heavily on state funding for their operations while others are financed primarily from local property taxes.

The formula by which the state determines the amount of funding which it will provide to each school district is called the "revenue limit" method. Under this method the state uses pupil population (average daily attendance of students) and other factors to decide the amount of revenue (the "revenue limit") which each school district will need to operate in that year.

If the "revenue limit" can be collected from local

property taxes then the state contributes only a nominal amount of "basic aid". If, on the other hand, the local area in which the district is located cannot generate the required level of funds through its property tax base, the state will make up the difference between the amount collected in property taxes and the "revenue limit." The percentage of "revenue limit" funding which can be satisfied from local property taxes fluctuates each year in each district as the pupil population changes and the property tax base varies. In short, the "revenue limit" funds include both state and local property tax monies in proportions which vary significantly from district to district and from year to year.

In the last fiscal year for which figures were available, 24% of Madera Unified School District's "revenue limit" funds were derived from local property taxes and 76% from state funds. In contrast, "basic aid" school districts like Taft and McKittrick School Districts (within the Eastern District of California) and San Mateo and Belmont school districts

(within the Northern District) received 100% of their "revenue limit" entitlement from local property taxes.

"Revenue limit" funds are kept on deposit with the county treasurers in the counties in which the local school districts are located and are disbursed to such districts as needed. The funds are invested along with other county monies at the discretion of the respective county treasurers.

The use of such "revenue limit" funds is unrestricted; that is, the governing boards of the local school districts exercise discretion as to their use. "Revenue limit" funds are not the only monies available to local school districts. Districts also rely on other local income, interest income from investments made by county treasurers, federal aid which is customarily restricted in its use, and state funds which are also categorically restricted.

There are no limitations or restrictions imposed by the state on the manner in which local school districts may pay

federal court judgments except, of course, that categorically restricted funds cannot be utilized for that purpose. The districts could pay federal court judgments from funds generated by local property taxes, by state contributions, by interest earned on those amounts, by funds carried over from previous years, or other sources. The respondent set forth no facts revealing the source of funds which would be used to pay any judgment in this action.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit has decided a federal question in a way which conflicts both with decisions of the United States Supreme Court and with its own decisions.

The unprecedented opinion of the Court of Appeals for the Ninth Circuit that local school districts are absolutely

immune from suit under the Eleventh Amendment is in direct conflict with the ruling of this Court on the same question and with the Ninth Circuit's own prior rulings.

In **Mount Healthy City School District v. Doyle,** 429 U.S. 274, 280, 97 S. Ct. 568, 572, 50 L. Ed. 2d 471 (1977), this Court ruled that school districts in Ohio are not immune from suit under the Eleventh Amendment despite state funding and control because they are more like cities or counties than they are like state agencies.

In **Padway v. Palches**, 665 F. 2d 965 (9th Cir. 1982) the Ninth Circuit found the decision in **Mount Healthy City School District v. Doyle, supra,** to be controlling and ruled that under the **Mount Healthy** standard California local school districts, like Ohio school districts, are not state agencies immune from suit.[1]

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[1] The underlying action in **Padway v. Palches, supra**, was remarkably similar to the case at bar. In that case an elementary school principal - like petitioner BELANGER - was suing her employer for gender

In the case at bar the Ninth Circuit entirely ignored its prior ruling in **Padway v. Palches, supra,** and gave **Mount Healthy City School District v. Doyle, supra,** only cursory consideration. It concluded that the **Mount Healthy City School District v. Doyle, supra,** precedent was distinguishable on two grounds which do not survive scrutiny.

First, the Court asserts that in **Mt. Healthy** the key factor was "the treatment of the school district under Ohio state law" and under such law "the state does not include political subdivisions" and "political subdivisions include local school districts." (Appendix B) In contrast, according to the reasoning of the Opinion, school districts are not political subdivisions "but rather agents of the state itself" under California law. Id.

The California Government Code itself demonstrates the

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discrimination arising out of her reassignment and discharge.

Court's error. Government Code section 970(c) states that:

> "Local public entity" includes a county, city district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the Regents of the University of California and does not include the state or any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

When California Government Code Section 970(c) was amended to include the above language in 1980, it repealed a number of special statutes applying to specific local public entities including Education Code Section 35201 which defined the responsibility of local school districts for payment of their debts. See 1980 Addition to Law Revision Commission Comment, Government Code Section 970(c) and Education Code Section 35201.

In short, the California Legislature decided in 1980 that a local school district is a "local public entity" and not a state agency and California law treats its local school districts in the same manner as does Ohio law.

The second basis upon which the Opinion seeks to distinguish **Mt. Healthy City Board of Education v. Doyle, supra**, is that "California has vested control of state funding in the state rather than local governments" and thus California and Ohio are different. (Appendix A) An examination of Ohio law, however, demonstrates that the control of school district funding is with the state, not local governments.

Article VI of the Ohio Constitution provides in part that:

> **§2 School funds.**
>
> The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state;. . .

> **§3 Public school system; boards of education.**
>
> Provisions shall be made by law for the organization, administration and control of the
>
> public school system of the state supported by public funds; . . .

Moreover, the Ohio State Board of Education is responsible for administering the allocation and distribution of state and local funds for local school districts. Ohio Rev. Code Ann. Sec. 3301.07.

As Justice Rehnquist noted in **Mt. Healthy City Board of Education v. Doyle**, **supra** at 280:

> Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education...and receives a significant amount of money from the State...But local school boards have extensive powers to issue bonds..and to levy taxes

> within certain restrictions of state law.

These same factors apply to local school districts in California.

In sum, the same factors which made school districts in Ohio subject to suit under **Mount Healthy City School District v. Doyle, supra,** apply in California and the holding of this Court cannot be ignored by the Ninth Circuit.

Furthermore, if a local school district is actually the state, then local counties and cities and other public entities which are also creatures of the state may soon acquire immunity as well.

For example, in **Moor v. County of Alameda**, 411 U.S. 693, 717-721, (1973), the County of Alameda argued that it was merely an arm or agent of the State. The Supreme Court rejected the County's position, reasoning that under California law a county may sue and be sued, is deemed a

"local public entity", may sell, hold, or otherwise deal in property, is liable for its own judgments, is authorized to provide public services, and can issue bonds payable from county taxes. Based upon such factors, according to the Supreme Court, a California county is an independent entity and not the state. All of the above criteria, however, apply equally to a California local school district as they do to a California county.

In the Opinion at issue, the Court has relied heavily on the state's control over local school district financing. Such reliance is based upon **Mitchell v. Los Angeles Community College District**, 861 F. 2d 198 (9th Cir. 1988), which listed as a key factor in judging Eleventh Amendment immunity whether a money judgment would be satisfied out of state funds.

However, as a matter of California statutory law, a

judgment entered against a school district cannot be satisfied by the State Treasury. Government Code Section 970.4 provides that the governing board of a local public entity, which includes a local school district, must pay a judgment in a certain specified manner. The State Controller is not responsible for the judgments of local school districts. California Government Code Section 970(c).

At issue in this case is whether the courthouse door will be shut on those hundreds of thousands of local school district employees and students whose statutory and constitutional rights have historically been protected by the federal courts. If a local school district is a state for purposes of the Eleventh Amendment and all suits against them are barred by sovereign immunity, whole classes of people will be deprived of rights which have been in existence for two

hundred years.[2]

CONCLUSION

For the foregoing reasons petitioner respectfully prays that the petition for a writ of certiorari be granted.

Dated, Fresno, California,

December 22, 1992.

Respectfully submitted,

FRAMPTON, HOPPE, WILLIAMS & BOEHM

MARY LOUISE FRAMPTON
Attorney for Petitioner
JEAN BELANGER

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[2] The Supreme Court has ruled recently that Eleventh Amendment immunity extends to claims in both federal and state courts. Will v. Michigan Dept. of State Police, 491 U.S. _____, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEAN BELANGER,
Plaintiff-Appellant,
v.
MADERA UNIFIED SCHOOL DISTRICT; BOARD OF TRUSTEES OF MADERA UNIFIED SCHOOL DISTRICT; THOMAS J. RILEY, School Superintendent,
Defendants-Appellees.

No. 90-16831
D.C. No. CV-89-00211-REC
OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief District Judge, Presiding

Argued and Submitted
February 14, 1992—San Francisco, California

Filed April 29, 1992

Before: Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges, and C.A. Muecke*, District Judge.

Opinion by Judge Wiggins

*Hon. C.A. Muecke, Senior United States District Judge for the District of Arizona, sitting by designation.

SUMMARY

Civil Litigation & Procedure/Immunity/Labor and Employment

Affirming a district court grant of summary judgment, the court of appeals held that a California school district was immune from suit under the eleventh amendment as an agent of the state performing governmental functions, a judgment against which would be satisfied out of state funds.

Appellant Jean Belanger brought a section 1983 action against a California school district alleging that her removal as a school principal and reassignment to a classroom teaching position was because of her gender and as retaliation for testifying against the school district in a separate discrimination action. According to the school district, Belanger failed to work effectively with parents and teachers, and illegally altered student records. The district court granted summary judgment for the school district, holding that as a matter of law it was a state agency immune from suit under the eleventh amendment.

[1] Whether the school district in question was a state agency for purposes of eleventh amendment immunity turned on the application of the multi-factored balancing test summarized in *Mitchell v. Los Angeles Community College Dist.* The most crucial question was whether the district had such independent status that a judgment against it would not impact the state treasury. [2] An analysis of the *Mitchell* factors showed that the school district in this case was a state agency for eleventh amendment purposes. [3] Here, a money judgment against the school district would be satisfied out of state funds. Unlike most states, California school districts have budgets that are controlled and funded by the state government rather than the local districts. [4] The result of the *Serrano* decisions and Proposition 13 has been strict state

control of public school funding. [5] In addition, the local character of property tax revenue is lost when it is commingled with state funds under a state controlled revenue list. Thus, under California's revenue limit system, a judgment against the school district would be satisfied from state funds.

[6] California law treats public schooling as a statewide or central governmental function. [7] California public schools have long been treated as state agencies under California law. [8] That school districts enjoy wide discretion and considerable autonomy does not change the fact that public schooling is considered a central governmental function, and that school districts are considered agents of the state in carrying out this function. [9] It does not necessarily follow that a school district can be sued for money damages just because it can be sued in its own name. [10] The fact that school districts can own property was entitled to little weight in the overall balance. [11] School districts have the corporate status of agents of the state for purposes of school administration.

[12] Because California has vested control of school funding in the state rather than in local governments, the school district in this case was easily distinguished from the Ohio school district in *Mount Healthy*.

COUNSEL

Mary Louise Frampton, Frampton, Soley, Hoppe, Williams & Boehm, Fresno, California, for the plaintiff-appellant.

Michael E. Smith and Ellen M. Jahn, Lozano, Smith, Smith, Wolliver & Behrens, Fresno, California, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

Jean Belanger, plaintiff/appellant, appeals the district court's grant of summary judgment in favor of the Madera Unified School District (school district), defendant/appellee. Belanger argues that the district court erred in finding that the school district is immune to suit under the Eleventh Amendment. Belanger filed a timely notice of appeal on November 30, 1990, and this court has jurisdiction under 28 U.S.C. § 1291 (1988). We affirm.

BACKGROUND

At the start of the 1988-89 school year, Belanger was removed from her position as principal at the Ripperdan Elementary School and reassigned to a classroom teaching position. Belanger alleges she was reassigned because of her gender and in retaliation for testifying against the school district in a separate discrimination action. The school district disputes Belanger's allegations and claims that Belanger was reassigned because of her extremely poor performance as a principal. According to the school district, Belanger failed to work effectively with parents and teachers and illegally altered student records. This allegedly caused the district to receive continuous complaints from parents and teachers about Belanger and resulted in six of Ripperdan Elementary's nine teachers leaving the school.

On March 20, 1989, Belanger brought an action against the school district under 42 U.S.C. § 1983 (1988). Belanger engaged in extensive discovery to obtain evidence showing that a judgment against the school district would not be satisfied out of state funds. After this discovery, the district court granted the school district's motion for summary judgment.

The district court determined that as a matter of law the school district is a state agency that is immune from suit under the Eleventh Amendment to the United States Constitution.

DISCUSSION

The only issue on appeal is whether the school district is a state agency for purposes of the Eleventh Amendment.[1] This issue turns on the application of law to established facts. Thus, the grant of summary judgment is reviewed de novo to determine whether, viewing the evidence in a light most favorable to Belanger, the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *see also United States v. McConney*, 728 F.2d 1195, 1204 (9th Cir.) (en banc) (application of law to established facts is reviewed de novo), *cert. denied*, 469 U.S. 824 (1984).

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the exact limits of the Eleventh Amendment are difficult to determine,[2] it is clear that the

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[1]The district court also ruled that injunctive relief was barred by the Eleventh Amendment because such relief would be retrospective in nature, citing *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). Belanger fails to raise this issue in her statement of issues presented for review, and she does not discuss this issue in her opening brief. Instead, Belanger addresses this issue for the first time in a footnote in her reply brief, depriving the school district of the opportunity to address Belanger's argument. Because "appellants cannot raise a new issue for the first time in their reply briefs," we decline to consider Belanger's argument on the issue of injunctive relief. *Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990) (quoting *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986)).

[2]Compare Pennsylvania v. Union Gas Co., 491 U.S. 1, 14-19 (1989) (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J.) (Con-

Eleventh Amendment prohibits actions for damages against state agencies when Congress has failed to express a contrary intent. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (congressional intent to override the principles of sovereign immunity embodied in the Eleventh Amendment must be "unmistakably clear"). In this case, Belanger concedes that her claims for damages are barred if the school district is indeed a state agency for purposes of the Eleventh Amendment. *See, e.g., Quern v. Jordan*, 440 U.S. 332 (1979) (state governments and their agencies are not amenable to suit under 42 U.S.C. § 1983).

[1] Whether the school district is a state agency for purposes of the Eleventh Amendment turns on the application of the multi-factored balancing test summarized in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989).

> To determine whether a governmental agency is an arm of the state, the following factors must be examined: [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. (citing *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982)). We must examine these factors in light of the way California law treats the governmental agency. *Id.* As

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gress has the power to abrogate Eleventh Amendment immunity when legislating pursuant to the Commerce Clause) *with id.* at 35-42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J.) (Congress cannot abrogate Eleventh Amendment immunity under the Commerce Clause).

indicated by the reasoning and holding in *Mitchell*, the first factor is predominant: "The most 'crucial question ... is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.' " *Jackson*, 682 F.2d at 1350 (quoting *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981)); *see also Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (if a "retroactive award of monetary relief" will be paid from state treasury funds, it is barred by the Eleventh Amendment); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981) ("Obviously the source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction."), *aff'd on other grounds sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983).

A. Application of the Mitchell Factors

[2] An analysis of the five *Mitchell* factors demonstrates that the school district in this case is a state agency for purposes of the Eleventh Amendment. Although Belanger's view of certain factors are not without merit, Belanger cannot prevail on the first and most important factor because a judgment against the school district would be satisfied out of state funds. Moreover, under California law, the school district is a state agency that performs central governmental functions. Thus, the school district is protected by the Eleventh Amendment.

1. A Money Judgment Would Be Satisfied Out of State Funds

[3] Unlike most states, California school districts have budgets that are controlled and funded by the state government rather than the local districts. As in *Mitchell*, the school district's budget in this case "is made up of funds received from the state's general fund pursuant to a state calculated formula." 861 F.2d at 201. California's centralized control of

school funding can be attributed to two key factors—decisions by the California Supreme Court in 1971 and 1976, and the adoption of Proposition 13 in 1978.

In *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*), the California Supreme Court determined that the system of public school financing in California that failed to equalize school spending for each student was unconstitutional. The California legislature responded by enacting Senate Bill 90 in an attempt to equalize public school funding. The legislature significantly increased state funding for school districts and created "revenue limits"—limits on the expenditures per pupil in school districts with ample local funding. *See Serrano v. Priest*, 557 P.2d 929, 931-36 (Cal. 1976) (*Serrano II*), *cert. denied*, 432 U.S. 907 (1977).

However, the California Supreme Court was still unsatisfied because the legislature had provided for voter overrides and permissive overrides—special exceptions to the revenue limits. In *Serrano II*, the California Supreme Court ruled that the equal protection provisions of the California Constitution require strict statewide equalization of school spending per pupil. Under *Serrano II*, the state has a duty to ensure that all school districts receive an equal amount of funding per student. Thus, the state must prevent wealthier districts from raising too much local revenue, enabling California to equalize school district budgets through state spending. *See* 557 P.2d at 937, 958.

Proposition 13's property tax limitations inadvertently helped California achieve the result mandated in *Serrano II*. By reducing and capping the property tax revenues used to fund local schools, Proposition 13 ensured that the state, rather than local school districts, would control funding for public schools.

[4] The result of the *Serrano* decisions and Proposition 13 has been strict state control of public school funding. The

state sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. *See generally* Cal. Educ. Code §§ 41600-41610, 42238-42251 (West 1978 & Supp. 1992). In short, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.

In the present case, Belanger concedes that seventy-five percent of the school district's budget comes directly from the state school fund. However, Belanger argues that a judgment might be satisfied out other funds in the district's budget derived from local property taxes. According to Belanger, "There is simply no way of knowing whether a money judgment in this litigation would be paid from state funds or local funds or a combination of both."

In light of California's centralized school funding system, this argument is irrelevant. Under the revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget. Any local funds withdrawn from the budget to pay a judgment are unavailable for educational purposes, and state funds in the budget must cover any critical educational expenses that the local funds would have covered absent the judgment. This effectively draws state funds away from other programs in the budget to pay the judgment. In essence, any use of the commingled funds is a use of state funds. *See Mitchell*, 861 F.2d at 201 (stressing that "the district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula").

[5] Moreover, the local character of property tax revenue is lost when it is commingled with state funds under a state controlled revenue limit. As the district court noted, "If the entitlement from the property tax decreases, the amount of the

revenue limit entitlement funded by the state increases, and vice-versa." Under the centralized revenue limit system, the allocation of property tax revenue is hopelessly intertwined with the allocation of state funds, and any change in the allocation of property tax revenue has a direct effect on the allocation of state funds.[3]

Finally, because the state has complete control over the amount of property tax revenue that the district receives, and because this revenue is simply credited toward the revenue limit payment from the state fund, the property tax revenue is no more local than state income taxes generated from the same area. The state has assumed the burden of funding public schools, and property tax revenue allocated to the public school revenue limit program is state money collected for a state purpose.

In summary, the bulk of the school district's budget comes directly from the state school fund, and the property tax revenue in the budget is interchangeable with the state funds and is treated as state funds for all practical purposes. Under California's revenue limit system, a judgment against the school district would be satisfied from state funds.

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[3]According to Belanger, the *Mitchell* decision is flawed because it incorrectly states that "some fees charged by the district's colleges go to the state." 861 F.2d at 201. Belanger's complaints about *Mitchell* ignore the key point that state and local funds are interchangeable and hopelessly commingled under California's school funding system. Whether the technical accounting procedures list the fees as going into the state fund before they are paid back to the college district is irrelevant. In any practical sense, these fees are state funds under state control. The fees are credited against the state payments to the community college district. The practical result is the same as if the fees had been directly collected by the state.

Belanger also argues that the *Mitchell* precedent should be reconsidered because the plaintiff in *Mitchell* was not represented by counsel and did not conduct discovery. According to Belanger, the *Mitchell* decision rests on an inadequate record. As the district court pointed out, Belanger asserts no authority for the proposition that this court may reevaluate the factual findings in *Mitchell*. We find that *Mitchell* controls the case at bar.

2. *Public Schooling Is a State Function Under California Law*

[6] California law treats public schooling as a statewide or central governmental function. As discussed above under the first *Mitchell* factor, California has assumed total control over the funding of public schools. Moreover, California exercises substantial centralized control over other public school decisions. For example, the state government dictates when students may be expelled or suspended, Cal. Educ. Code § 48900 (West Supp. 1992), and the state exercises control over the textbooks that are used in public schools. Cal. Const. art. IX, § 7.5 (West Supp. 1992); Cal. Educ. Code § 51510 (West 1989). In addition, the California Superintendent of Public Instruction has broad authority to "[s]uperintend the schools of this state." Cal. Educ. Code § 33112(a) (West 1978).

[7] California public schools have long been treated as state agencies under California law. The California Constitution requires the state legislature to "provide for a system of common schools" and sets forth detailed requirements for those schools. Cal. Const. art. IX, §§ 5, 6 (West 1954 & Supp. 1992). In *Hall v. City of Taft*, 302 P.2d 574 (Cal. 1956), the California Supreme Court recognized that public schools are a central government function in California:

> The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the [state] Constitution and the state Legislature is given comprehensive powers in relation thereto.

Id. at 576. The *Hall* decision went on to emphasize that "[s]chool districts are agencies of the state for the local operation of the state school system." *Id.* at 577.

[8] Belanger argues that school districts enjoy wide discretion and considerable autonomy since the enactment of Cal.

Educ. Code § 35160.1 in 1987. However, section 35160 does not change the fact that public schooling is considered a central governmental function under California law and that school districts are considered agents of the state in carrying out this function. As Belanger recognizes, it is the *state legislature* that has acknowledged the local needs of the individual school districts throughout the state. That the state itself has decided to give its local agents more autonomy does not change the fact that the school districts remain state agents under state control.

California law is well settled that providing public education is a state function.

> Leaving aside for the moment statutes and regulations, which more specifically delineate state supervision of education, a perusal of the foregoing constitutional provisions and the cases interpreting them leaves no doubt that, as has been repeatedly held by California courts, the management of public schools in California is a matter of statewide supervision rather than a local concern. Moreover, the Legislature has plenary authority over the education of California's youth. Thus, although the state can assign certain duties with respect to the local operation of schools to local agencies, it cannot by such incidental delegations abdicate its role as the entity ultimately responsible for the proper and lawful functioning of the state's schools.

San Francisco NAACP v. San Francisco Unified School Dist., 484 F. Supp. 657, 662 (N.D. Cal. 1979) (citations omitted); *see also Stones v. Los Angeles Community College Dist.*, 572 F. Supp. 1072, 1077 (C.D. Cal. 1983) ("Under California law, the education of the citizenry is an exclusive state function that cannot be delegated."), *aff'd on other grounds*, 796 F.2d 270 (9th Cir. 1986).

Belanger is correct that public schooling is usually considered to be a local governmental function. However, through the state constitution, statutes, and supreme court decisions, California has made public schooling a state governmental function. Because the panel's analysis must be governed by "the way state law treats the [school district]," *Mitchell*, 861 F.2d at 201, Belanger's argument fails. Under California law, school districts are agents of the state that perform central governmental functions.

3. School Districts Can Sue and Be Sued

[9] It is undisputed that California school districts can sue and be sued in their own name. Cal. Educ. Code § 35162 (West 1978). Thus, the district court is correct that this factor militates against a finding of Eleventh Amendment immunity. However, it does not necessarily follow that the school district can be sued for money damages just because it can be sued in its own name. If a school district is a state agency for purposes of the Eleventh Amendment, suits against the district in its own name are subject to the same Eleventh Amendment constraints as suits against the state. Therefore, although this third *Mitchell* factor deserves some consideration, this factor is entitled to less weight than the first two factors.

4. School Districts Can Own Property

[10] It is also undisputed that school districts can hold property in their own name. Cal. Educ. Code § 35162. However, California law still treats such property as state property rather than local government property: "The beneficial ownership of property of the public schools is in the state." *Hall*, 302 P.2d at 577. Thus, although the district court found that this factor militates against Eleventh Amendment immunity, the property ownership analysis is a close question and for this reason is entitled to little weight in the overall balance.

5. *School Districts Have the Corporate Status of State Agents*

[11] Belanger argues that the fifth *Mitchell* factor provides no guidance in resolving the Eleventh Amendment immunity issue. Belanger focuses on the fact that school board members are often viewed as both "municipal officers" and "state officers." This argument ignores the fact that "[s]chool districts are agencies of the state for the local operation of the state school system." *Hall*, 302 P.2d at 577. We agree with the district court's conclusion that school districts have the corporate status of agents of the state for purposes of school administration.

B. The *Mount Healthy* Analogy

Belanger relies heavily on *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) and argues that the California school district in this case is analogous to the school district in *Mount Healthy*. However, Belanger ignores the key differences between the Ohio school district in *Mount Healthy* and the school district in this case.

In *Mount Healthy*, the key factor was the treatment of the school district under Ohio state law: "Under Ohio law the 'State' does not include 'political subdivisions,' and 'political subdivisions' do include local school districts." *Id.* at 280. Under California law, school districts are not political subdivisions, but rather agents of the state itself. Moreover, "local school boards [in Ohio] have extensive powers to issue bonds and to levy taxes within certain restrictions of state law." *Id.* (citations omitted). In California, the state has assumed responsibility for and control over school funding. Under California's revenue limit system, any local revenue is simply credited against the state school fund payments, and there is little local autonomy in school funding.

[12] In the critical area of school funding, around which this litigation revolves, California has selected a different path

from that of most states. California has vested control of school funding in the state rather than local governments. Thus, the school district in this case is easily distinguished from the Ohio school district in *Mount Healthy*.

CONCLUSION

The district court correctly applied the *Mitchell* test and determined that the school district was immune to suit under the Eleventh Amendment. The court determined that the school district is an agent of the state that performs state governmental functions and that a judgment would be satisfied out of state funds. We are in agreement with the district court and can find no error in the court's analysis. Therefore, we AFFIRM the district court's decision.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals
F I L E D
October 1, 1992
Cathy A. Catterson, Clerk

JEAN BELANGER,

Plaintiff-Appellant,

vs.

MADERA UNIFIED SCHOOL DISTRICT; BOARD OF TRUSTEES OF MADERA UNIFIED SCHOOL DISTRICT; THOMAS J. RILEY, School Superintendent,

Defendants-Appellees.

No. 90-16831
D.C. No. 90 16831

ORDER

Before: HALL and WIGGINS, Circuit Judges, and MUECKE, District Judge*

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing

en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Hon. C.A. Muecke, Senior United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

California Government Code Section 970(c)

"Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the Regents of the University of California and does not include the state or any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

California Government Code Section 970.4

Except as provided in Section 970.6, the governing body of a local public entity shall

pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment, with interest thereon, out of any funds to the credit of the local public entity that are:

(a) Unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes; or

(b) Appropriated for the current fiscal year for the payment of judgments and not previously encumbered.

California Education Code Section 35160

On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with

the purposes for which school districts are established.

California Education Code 35160.1

(a) The Legislature finds and declares that school districts, county boards of education, and county superintendents of schools have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs, common as well as unique, school districts, county boards of education, and county superintendents of schools should have the flexibility to crete their own unique solutions.

(b) In enacting Section 35160, it is the intent of the Legislature to give school districts, county boards of education, and county superintendents of schools broad authority to carry on activities and programs, including the

expenditure of funds for programs and activities which, in the determination of the governing board of the school district, the county board of education or the county superintendent of schools are necessary or desirable in meeting their needs and are not inconsistent with the purposes for which the funds were appropriate. It is the intent of the Legislature that Section 35160 be liberally construed to effect this objective.

(c) The Legislature further declares that the adoption of this section is a clarification of existing law under Section 35160.

California Education Code Section 35162

In the name by which the district is designated the governing board may sue and be sued, and hold and convey property for the use

and benefit of the school district.

California Education Code Section 35201

The governing board of any school district shall pay any judgment for debts, liabilities, or damages out of the school funds to the credit of the district, subject to the limitation on the use of the funds provided in the Constitution. If any judgment is not paid during the tax year in which it was recovered:

(a) And if, in the opinion of the board, the amount is not too great to be paid out of taxes for the ensuing year, the board shall include in its budget for the ensuing tax year a provision to pay the judgment, and shall pay it immediately upon the obtaining of sufficient funds for that purpose.

(b) And if, in the opinion of the board, the

amount of the judgment is so great that undue hardship will arise if the entire amount is paid out of taxes for the next ensuing tax year, the board shall provide for the payment of the judgment in not exceeding 10 annual installments with interest thereon up to the date of each payment, and shall include provision for the payment in each budget for not exceeding 10 consecutive tax years next ensuing. Each payment shall be of an equal portion of the principal of he judgment, except that the board, in its discretion, may provide for the prepayment of any one or more installments or any part of an installment.

CERTIFICATE OF SERVICE

I hereby certify that typewritten copies of the Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit for Petitioner JEAN BELANGER in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 28th day of December, 1992.

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(40 copies)

MICHAEL SMITH
Jerome Behrens
Ellen Jahn
LOZANO, SMITH, SMITH & WOLIVER
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Attorneys for Respondents
(three copies)

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 28th day of December, 1992, at Fresno, California.

Margaret Gaeta